NO. 856974

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LEASA LOWY,

Respondent,

v.

PEACEHEALTH, a Washington Corporation; ST. JOSEPH HOSPITAL; and UNKNOWN JOHN DOES,

Petitioners

AMICUS CURIAE MEMORANDUM OF WASHINGTON STATE HOSPITAL ASSOCIATION, GROUP HEALTH COOPERATIVE, MULTICARE HEALTH SYSTEM, PROVIDENCE HEALTH & SERVICES, SEATTLE CHILDREN'S HOSPITAL, AND SWEDISH HEALTH SERVICES

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I. INTRODUCTION

Over the past forty years, the legislative and judicial branches of our state government have expressed a strong and consistent public policy in favor of maintaining confidentiality of materials generated for or by hospital quality improvement committees programs.[1] The legislature has specifically provided that records of hospital quality improvement ("QI") programs are not subject to "review," "disclosure," or "discovery" in any civil action,[2] and that "no person ... who participated in the creation, collection, or maintenance of information ... specifically for the committee shall be permitted to testify in any civil action as to the content of ... the document and information prepared specifically for the committee."[3] Consistent with these express commands, when medical malpractice plaintiffs have sought discovery regarding QI matters, this Court has refused to permit discovery of "information included within committee records,"[4] stating that plaintiffs must develop their cases through "sources other than the records of the committee."[5]

Notwithstanding this clear statutory language and precedent, the Court of Appeals here held that plaintiffs may compel hospitals to review

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[1] L.1971 ex.s. c 144 § 1, currently codified as RCW 4.24.250 and *Anderson v. Breda,* 103 Wn.2d 901, 700 P.2d 737 (1985).
[2] RCW 4.24.250; RCW 70.41.200.
[3] RCW 70.41.200(3).
[4] *Coburn v. Seda,* 101 Wn.2d 270, 278-79, 677 P.2d 173 (1984).
[5] *Anderson v. Breda,* 103 Wn.2d at 906.

privileged QI records and to provide them with information which exists and is obtainable only as a product of the QI process. This holding creates an issue of substantial public importance because it significantly undermines the integrity of the QI process. The Court of Appeals' decision also conflicts with decisions of this Court.

II. IDENTITY & INTEREST OF AMICI

The parties submitting this brief are the Washington State Hospital Association ("WSHA"), Group Health Cooperative, MultiCare Health System, Providence Health & Services, Seattle Children's Hospital, and Swedish Health Services. WSHA is a membership organization representing the interests of 97 Washington hospitals, all of which maintain quality improvement programs under RCW 70.41.200. Each of the other *amici* operates one or more licensed Washington hospitals that has a quality improvement committee subject to RCW 70.41.200, or maintains other types of facilities or organizations with quality assurance or quality improvement programs that are subject to RCW 4.24.250 or RCW 70.41.200. As such, all *amici* have a direct and concrete interest in maintaining the integrity and effectiveness of their quality improvement programs, to the end that adverse patient outcomes are minimized or avoided.

III. STATEMENT OF THE CASE

Respondent sued Petitioner St. Joseph Hospital ("the hospital"), alleging negligence in connection with an intravenous ("IV") infusion. She sought discovery from the hospital regarding any other IV mishaps occurring within the preceding nine years. Initially, she made a CR 34 request for documents that expressly called for production of incident reports and other documents that are privileged and immune from discovery under RCW 4.24.250 and RCW 70.41.200. CP 16-17. After the hospital objected on these grounds, Dr. Lowy attempted to do indirectly what she could not do directly, issuing a CR 30(b)(6) deposition notice for a representative of the hospital to testify concerning "any and all facts and information relating to ... [i]ncidences of IV infusion complications and/or injuries at St. Joseph's Hospital for the years 2000-2008." CP 17, 21. The Court of Appeals overruled the hospital's objections and the superior court's decision to grant a protective order precluding this testimony. *Lowy v. PeaceHealth*, 159 Wn. App. 715, 247 P.3d 7 (2011).

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IV. ARGUMENT

A. Failure to Heed Controlling Statutory Language Threatens to Eviscerate the Privilege for Collection of Quality Improvement Information.

The fundamental premise behind the discovery immunities and evidentiary privileges created by RCW 70.41.200 and RCW 4.24.250 is that confidentiality is necessary to encourage hospitals and other health care providers to engage in candid self-examination of the care they deliver.[6] Specifically, RCW 70.41.200(3) provides that:

> information and documents, ... including incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure ... or discovery or introduction into evidence in any civil action.

Here, as a critical part of its QI program, the hospital collected medical incident reports submitted by its staff and entered the information contained in those reports into an electronic database.[7] The database facilitates and streamlines the quality improvement process by allowing the hospital to sort and analyze information contained in the incident reports. There is no dispute in this case that the hospital had a duly constituted QI committee and, consequently, that the incident reports and

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[6] *Id.* at 905.

[7] Many hospitals utilize software packages that submit incident reports electronically and automatically compile the submitted information for review and analysis. In such cases, the incident report and the database are effectively a single record.

the data contained within them, as well as the electronic database itself, are all immune from discovery or disclosure under RCW 70.41.200(3).

Notwithstanding these undisputed facts and clear statutory language, the Court of Appeals held that the plaintiff is entitled to compel the hospital to query its database of statutorily-mandated reports of medical incidents in order to identify "all incidences of IV infusion injuries or complications during the preceding nine years," to have its representative testify about the results, and to produce the medical records associated with those incidents.[8] It concluded that this process did not constitute "review or disclosure" of QI materials and, therefore, was permitted under its interpretation of the statute. The Court of Appeals' conclusion is wrong for the following reasons.

First, the lower court based its decision solely on a strained interpretation of the statutory prohibition on "review or disclosure" of QI information, while ignoring the separate command that information "collected and maintained" by a QI committee is not "subject to ... discovery." As this Court held in *Anderson v. Breda,* the discovery prohibition "prevent[s] the discovery and use of the records ... of the committee." 103 Wn. 2d at 906. Here, at a minimum, the lower court's decision permits the use of QI information to develop evidence on behalf

[8] *Lowy v. Peace Health,* 159 Wn. App. at 722.

of the plaintiff. This interpretation directly conflicts with *Anderson's* requirement that plaintiffs must develop their evidence through "sources other than the records of the committee." *Id.*

In this regard, the Court of Appeals also apparently failed to recognize that the database itself is simply a compilation of data extracted from medical incident reports, which are expressly privileged under the statute. For this reason, plaintiff has not argued that the law would permit her to require the hospital to examine each and every medical incident in order to produce the information requested, or to testify about the contents of those reports. Yet, the Court of Appeals order permits precisely the same result.

In addition, the decision fails to account for the fact that the decision by hospital staff members to submit a medical incident report is a key part of the QI process. The premise underlying the privilege is that staff members will be reluctant to report if there is any possibility that their information, including the fact that a report has been made, will be used against the hospital, the reporting staff member, or co-workers. To this end, not only are the reports and their contents privileged, but RCW

70.41.200(3) provides that persons who submit incident reports cannot be compelled to testify concerning them.[9]

Further, the Court of Appeals erroneously assumed that the fact that an incident report was submitted and compiled in the QI database means that there was, in fact, a prior negligent act that would be relevant to plaintiff's claim of corporate negligence. In this regard, it is important to understand that hospital QI policies often encourage over-reporting, in that staff are encouraged to report not only events adversely affecting a patient, but also to report any suspected or potentially unsafe conditions involving patient care.

Finally, the Court of Appeals' holding has no textual or logical boundaries. Literally read, that holding is that the quality improvement privilege is not breached when a hospital representative is compelled to testify about the results of a review of privileged records—either the incident reports themselves or the database derived from incident reports. This holding eviscerates the privilege, not only because it discloses the

[9] RCW 70.41.200(2) provides in relevant part:

> [N]o person ... who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of ... the documents and information prepared specifically for the committee.

fact that an incident report was submitted, but it requires the hospital representative to testify "regarding" those privileged records.

For example, if the hospital reports only a few prior similar incidents, little doubt exists that plaintiff will want to verify that the hospital's information is accurate. Conversely, if the result of discovery into the QI records shows that there were a significant number of prior incidents, plaintiff would seek to introduce that information at trial to show that the hospital knew that it had a problem and should have done something about it. In and of itself, this use of QI information violates the privilege construed in *Anderson*. And, if that use is permitted, the hospital will be placed in the position of either allowing plaintiff's evidence to go unanswered, or waiving the privilege in order to respond—such as by showing that there was not an excessive rate of complications or that the events did not have a common cause. This dynamic is in no way consistent with the language or purpose of the statute.

B. This Court's Intervention is Necessary to Protect the Integrity of the Quality Improvement Process.

In *Coburn v. Seda*, 101 Wn.2d 270, 278, 677 P.2d 173 (1984), this Court held that "information included with [QI] committee records" is not discoverable. The Court of Appeals' decision in this case allows the plaintiff to take direct advantage of the fact that the hospital's QI efforts

by utilizing information in QI committee records to build her case. This result is directly contrary to the policy of the QI discovery immunity and privilege, which "prevents the opposing party from taking advantage of a hospital's careful self-assessment." *Coburn v. Seda*, 101 Wn.2d 270, 274, 677 P.2d 173 (1984).

Even though it cited no ambiguity in the statutory language, the Court of Appeals apparently concluded that, because the hospital was unable to produce information regarding prior incidents without use of its QI database, it was acceptable to ignore the prohibition on discovery of QI information. It sought to justify this result by applying a rule of strict construction and consideration of a stilted view of the purpose of the privilege. Resorting to these devices was inappropriate because the statutory language is clear, especially in light of this Court's prior holdings.

Further, although the Court of Appeals apparently believed that it was doing no more than to order the hospital to produce copies of the medical records of patients identified from the QI database, it failed to place any limitations on its holding. Accordingly, this Court should grant review if only to make it clear that use of QI information is required only as a last resort and that plaintiffs cannot introduce QI-derived evidence if

it would place hospitals in a position where they cannot respond without further disclosure of QI information.

V. CONCLUSION

For these reasons, the Court should grant respondents' petition for review.

RESPECTFULLY SUBMITTED this 26 day of April 2011

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